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No. 1071

In the Supreme Court of the United States

OCTOBER TERM, 1969

HAROLD KONIGSBERG, PETITIONER

v.

PASQUALE J. CICCONE, M.D., MYRL E. ALEXANDER AND JOHN N. MITCHELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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In November, 1965, while he was serving a ten year sentence in federal prison, petitioner was transferred to the Federal Medical Center at Springfield, Missouri. He was certified as insane, pursuant to 18 U.S.C. 4241, on April 5, 1966. In September, 1966, the Attorney General authorized his removal to New York for trial in state court on a writ of habeas corpus *ad prosequendum* (App. E). He was housed in New York as a federal prisoner under fed-

eral authority, and was taken to the state trial by a federal marshal. Following his conviction and sentencing in New York, he was returned to Springfield. On August 16, 1967 he was decertified, but was kept at Springfield, as the required medical care and treatment was not available in any other existing penal institution (Pet. 3).

On August 2, 1967, petitioner filed a petition for a writ of habeas corpus in the Western District of Missouri challenging the conditions of his confinement. He also asked the district court to declare his New York sentence void on the ground that it was illegal for the federal government to assist the state by making him available for trial under 18 U.S.C. 4085 while he was certified as insane under 18 U.S.C. 4241. The district court (285 F. Supp. 585) and the court of appeals (417 F. 2d 161) declined to grant such relief.

The only relief petitioner now seeks in challenging his federal custody on habeas corpus, vacation of the New York judgment, is manifestly inappropriate. No decision supports the attempt by petitioner to challenge, by habeas corpus directed to his federal custodian, a state conviction presently on appeal to the state court, and which petitioner has not yet begun to serve.

In any event, petitioner's transfer to New York was authorized by 18 U.S.C. 4085 and not prohibited by 18 U.S.C. 4241. In providing that an insane federal prisoner may be kept in an authorized institution until restored to sanity or until the expiration of his sentence, Section 4241 is designed to protect

both the deranged prisoner and the general prison population. It does not prevent the Attorney General from determining that a certified prisoner may temporarily be transferred to other federal custody for a short period of time. Moreover, mental incompetence is neither a fixed and immutable state, nor a necessary consequence of insanity. Petitioner's certification as insane in April 1966 does not prove that he was incompetent to stand trial at the time of his transfer, October 1966. *McIntosh* v. *United States*, 176 F. 2d 514 (C.A. 8).[1] Petitioner's sanity and competency at the time of trial was a matter to be determined by the New York trial court, not by federal officials. See *Gunther* v. *United States*, 215 F. 2d 493 (C.A.D.C.). The government could reasonably presume that petitioner's constitutional rights would be protected at the trial, and petitioner "* * * should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other * * *." *Ponzi* v. *Fessenden*, 258 U.S. 254, 260.

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1970.

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[1] Petitioner was found competent by the state court and was later decertified by federal authorities.

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